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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 17-00093 WHA

Plaintiff,

**ORDER RE MOTION  
FOR SANCTIONS**

v.

MARCUS ETIENNE, ELIZABETH  
GOBERT, CRAIG MARSHALL, and  
MARIO ROBINSON

Defendants.

**INTRODUCTION**

In this prosecution under the Racketeer Influenced and Corrupt Organizations Act, the Violent Crimes in Aid of Racketeering Act, and other penal statutes, defendant moves to exclude certain recorded statements from introduction at trial. For the reasons below, the motion is

**DENIED.**

**STATEMENT**

According to the ten-page superseding indictment, defendant Mario Robinson was a member of the “Etienne Enterprise,” a criminal organization that ran a marijuana-trafficking operation from California to Louisiana and Texas. In March 2016, Robinson, along with certain of his co-defendants, allegedly murdered Trice Thibodeaux (“T.T.”) in furtherance of their marijuana-trafficking operation (Dkt. No. 37). In the days following the murder, Sergeant Richard Vass of the Oakland Police Department made a number of recorded telephone calls to Robinson.

1 In November 2017, a scheduling order set a deadline of February 20, 2018, for the  
2 government to produce all materials covered by Rule 16, under penalty of preclusion. The  
3 scheduling order further provided that “Rule 16 materials acquired after February 20 by the  
4 government or any of its agents subject to Rule 16 must be produced within fourteen calendar  
5 days of receipt or acquisition by government counsel or its agent.” Robinson timely made a  
6 written Rule 16 request in September 2017. The letter requested, among other things, copies of  
7 all written or recorded statements of Robinson. Despite this request, the government failed to  
8 disclose the recorded telephone calls by the February 2018 deadline (Dkt. Nos. 72, 297).

9        In September 2018, litigation ensued regarding defendant Marcus Etienne’s subpoena to  
10      the Oakland Police Department. Throughout that litigation, the government represented to the  
11      Court that the subpoena should be quashed because OPD “ha[d] given [the government]  
12      everything in their files” (Dkt. Nos. 230, 280 at 25:9–12). This representation was false.  
13      Contrary the government’s and OPD’s repeated assurances, the government did not, in fact, have  
14      “everything” in OPD’s files. Although government counsel has yet to submit a sworn statement  
15      to this effect, the government asserts that during the subpoena litigation it uncovered “several  
16      additional items” that OPD had not previously turned over, including the recordings at issue  
17      here. The government also claims to have turned over the recordings “within days” of receiving  
18      them from OPD (Dkt. No. 314 at 2).

19           Ultimately, the government produced Robinson's recorded statements on October 26,  
20 less than four months before our current trial date. Robinson now moves to exclude those  
21 recorded statements from introduction at trial (Dkt. No. 297). This order follows full briefing  
22 and oral argument.

## ANALYSIS

Under Rule 16(a)(1)(B)(i), upon a defendant's request, the government must disclose all relevant recorded statements by the defendant if (1) "the statement is within the government's possession, custody, or control," and (2) "the attorney for the government knows — or through due diligence could know — that the statement exists." Rule 16(d)(2), in turn, provides that if a

1 party fails to comply with the Rule 16's disclosure requirements, the district court may, among  
2 other things "prohibit that party from introducing the undisclosed evidence."

3 Despite the government's prior representation that it had "everything" in OPD's file, it  
4 now claims that the recordings did not come into its "possession, custody, or control" until the  
5 government cross-checked its case file with OPD's file during the subpoena litigation. The  
6 government further claims that upon gaining possession of the recordings, it turned them over to  
7 the defense within days. If true, this order cannot conclude that the government failed to comply  
8 with its discovery obligations. And although this order does not condone the government's  
9 conduct — one would hope that the government would do the necessary "cross-check" prior to  
10 making representations to the Court — Robinson has not shown sufficient prejudice to warrant  
11 exclusion. Robinson received the recordings nearly four months before trial and knew of both  
12 the existence and content of the phone calls nearly a year before trial. Rule 16 sanctions are  
13 therefore unwarranted.

14 **CONCLUSION**

15 For the foregoing reasons, the motion for sanctions is **DENIED**, subject to the following  
16 condition. The government's assertions in its opposition brief as to the timing of its receipt and  
17 disclosure of the recordings are, as of yet, unsubstantiated in the record. By **DECEMBER 21**, the  
18 government shall submit a declaration supporting these factual assertions.

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20 **IT IS SO ORDERED.**

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22 Dated: December 14, 2018.

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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

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